A

Re Ferdilin bt Abdul Rahman; ex parte Affin Bank Bhd

B HIGH COURT (TAWAU) — BANKRUPTCY NOTICE NO TWU-29NCC-456/12 OF 2016
ALWI ABDUL WAHAB JC
5 JANUARY 2018

C *Bankruptcy — Creditor's petition — Setting aside — Judgment creditor presented creditor's petition to judgment debtor — Judgment debtor filed notice of objection against presentation of creditor's petition — Whether judgment debtor social guarantor — Whether there was non-compliance of s 5(3) of the Bankruptcy Act 1967*

D Affin Bank Bhd ('the JC') had agreed to let a unit of Toyota Hilux on hire purchase terms to one Roslina bt Tiri ('the hirer'). Due to non-payment of monthly instalment by the hirer, the JC had obtained a receiving and adjudication orders against the hirer. Subsequently, the JC presented the
E creditor's petition ('CP') against Ferdilin bt Abdul Rahman ('the JD'). Vide encl 11, the JD filed notice of objection against the presentation of the CP on the ground that the JD was a social guarantor and the JC had failed to satisfy the requirement of s 5(3) of the Bankruptcy Act 1967 ('the Act'). The learned deputy registrar granted order in terms of encl 11 and consequently ordered
F that the CP and bankruptcy notice be set aside. Hence, the present appeal. By way of a letter dated 12 July 2017, the JC informed the court that the hirer could not be located at the given address which was the reason why it failed to recover the debts. The JC submitted that the JD was not a social guarantor as the hirer was doing the business of transporting the oil palm fruits for profits by
G virtue of the MPOB license issued to the hirer ('exh BBM1'). It was further submitted that the hirer was self-employed and doing the business of buying and selling of oil palm fruits as stated in her application for hire purchase facility ('exh BBM2'). The JC further argued that the JD must have known that the hirer was self-employed and that the subject matter of the hire purchase
H would be used by the hirer for her business since they were relatives. The issues for the court's determination were whether the JD was a social guarantor; and whether there was a non-compliance of s 5(3) of the Act.

I **Held**, dismissing the appeal with costs of RM3,000 here and below subject to allocator:

(1) In both exhs BBM1 and BBM2, there was nothing stated that the said Toyota Hilux would be used by the hirer to generate incomes or profits for her business. By saying otherwise, learned counsel for the JC was only

making assumptions without referring to some credible evidence just because the hirer was self-employed and without any fixed monthly income (see para 8).

(2) The contention on the JD's presumed knowledge was made without referring to some credible evidence. It was not a sworn statement in the form of affidavit to be filed and served on the opponent. It would only be fair for this contention be put by way of affidavit and the JD would have the opportunity to state whether she had any knowledge on the status of the hirer's employment or otherwise in the form of an affidavit as well (see para 10).

(3) The filing of affidavit to satisfy the court pursuant to s 5(3) of the Act was mandatory in nature. The letter dated 12 July 2017 produced by learned counsel for the JC was far from sufficient to satisfy the court pursuant to s 5(3) of the Act as the letter was not a sworn statement of the JC or its representatives (see paras 17–18).

[Bahasa Malaysia summary

Affin Bank Bhd ('JC') telah bersetuju untuk menyewa sebuah unit Toyota Hilux atas terma sewa beli kepada Roslina bt Tiri ('penyewa'). Akibat daripada kegagalan untuk membayar ansuran bulanan oleh penyewa, JC telah memperoleh perintah-perintah penerimaan dan penghukuman terhadap penyewa. Berikutan itu, JC telah mengemukakan petisyen pemiutang ('CP') terhadap Ferdilin bt Abdul Rahman ('JD'). Melalui lampiran 11, JD telah memfailkan notis bantahan terhadap pembentangan CP itu atas alasan bahawa JD adalah penjamin sosial dan JC telah gagal memenuhi keperluan s 5(3) Akta Kebankrapan 1967 ('Akta tersebut'). Timbalan pendaftar yang bijaksana telah memberikan perintah mengikut terma lampiran 11 dan berikutan itu memerintahkan agar CP dan notis kebankrapan itu diketepikan. Justeru, rayuan ini. Melalui surat bertarikh 12 Julai 217, JC memberitahu mahkamah bahawa penyewa tidak dapat dikesan di alamat yang diberikan dan oleh sebab itu ia gagal mendapatkan semula hutang. JC berhujah bahawa JD bukan penjamin sosial kerana penyewa menjalankan perniagaan menghantar buah minyak kelapa sawit untuk keuntungan menurut lesen MPOB yang dikeluarkan kepada penyewa ('eksh BBM1'). Selanjutnya ia dihujahkan bahawa penyewa bekerja sendiri dan menjalankan perniagaan membeli dan menjual buah minyak kelapa sawit sepertimana dinyatakan dalam permohonannya untuk kemudahan sewa beli ('eksh BBM2'). JC selanjutnya berhujah bahawa JD mesti tahu bahawa penyewa bekerja sendiri dan bahawa hal perkara sewa beli akan digunakan oleh penyewa untuk perniagaannya memandangkan mereka saudara-mara. Isu-isu untuk ditentukan mahkamah adalah sama ada JD adalah seorang penjamin sosial; dan sama ada terdapat ketidakpatuhan s 5(3) Akta tersebut.

Diputuskan, menolak rayuan dengan kos RM3,000 tertakluk kepada alukator:

(1) Dalam kedua-dua eksh BBM1 dan BBM, tiada apa yang menyatakan bahawa Toyota Hilux tersebut digunakan oleh penyewa untuk menjana pendapatan atau keuntungan untuk perniagaannya. Dengan menyatakan sebaliknya, peguam yang bijaksana bagi pihak JC hanya membuat andaian tanpa merujuk kepada keterangan yang boleh dipercayai hanya kerana penyewa bekerja sendiri dan tanpa mempunyai pendapatan bulanan yang tetap (lihat perenggan 8).

(2) Hujah berhubung andaian pengetahuan JD telah dibuat tanpa merujuk kepada keterangan yang boleh dipercayai. Ia bukan kenyataan bersumpah dalam bentuk afidavit untuk difailkan dan disampaikan ke atas pihak lawan. Ia hanya adil jika hujah ini dikemukakan melalui afidavit dan JD mempunyai peluang untuk menyatakan sama ada dia mempunyai apa-apa pengetahuan tentang status pekerjaan penyewa atau sebaliknya dalam bentuk afidavit juga (lihat perenggan 10).

(3) Pemfailan afidavit untuk memenuhi mahkamah menurut s 5(3) Akta tersebut adalah bersifat mandatori. Surat bertarikh 12 Julai 2017 yang dikemukakan oleh peguam yang bijaksana bagi pihak JC tidak mencukupi langsung untuk memenuhi mahkamah menurut s 5(3) Akta tersebut kerana surat itu bukan kenyataan bersumpah JC atau wakilnya (lihat perenggan 17–18).]

Notes

For a case on setting aside, see 1(3) *Mallal's Digest* (5th Ed, 2017 Reissue) para 3434.

Cases referred to

Hong Leong Bank Bhd v Khairulnizam bin Jamaludin [2016] 4 MLJ 302; [2016] 7 CLJ 335, FC (folld)

Legislation referred to

Bankruptcy Act 1967 ss 5(3), 53
Bankruptcy Rules 1969 r 18

Haris bin Alimudin (Rahim Abdullah & Co) for the judgment creditor.
Darmin bt Achok (Johari Zelika & Amin) for the judgment debtor.

Alwi Abdul Wahab JC:

INTRODUCTION

[1] The hirer, Roslina bt Tiri had entered into a hire purchase agreement dated 26 March 2014 with the judgment creditor ('JC') where the latter had agreed to let to her on hire purchase terms a unit of Toyota Hilux bearing registration No SD 9070 K ('Toyota Hilux'). The hirer had stopped making her monthly instalment to the JC after the Toyota Hilux was involved in an accident with total damage to it and beyond an economical repair. On 23 November 2016, JC obtained a receiving and adjudication orders against the hirer. In less than six months ie on the 13 April 2017, the JC then presented the creditor's petition ('CP') dated 13 April 2017 against the judgment debtor ie Ferdilin bt Abdul Rahman ('JD').

NOTICE OF OBJECTION (ENCL 11)

[2] By encl 11 dated 31 July 2017, the JD filed the notice of objection against the presentation of the creditor's petition by the JC on the ground that the JD is a social guarantor and the JC has failed to satisfy the requirement of s 5(3) of the Bankruptcy Act 1967 ('the Act') through a sworn affidavit showing to the court that all avenues have been exhausted to recover the judgment debts from the hirer. The JD's encl 11 was opposed by the JC as it was the JC's contention that the JD was not a social guarantor and that it had complied with the said provision of the Act.

THE APPEAL

[3] On 4 October 2017, the learned deputy registrar ('DR') granted the order in terms of the JD's notice of objection under encl 11 and consequently ordered that the creditor's petition and bankruptcy notice ('BN') be set aside. Hence, the JC appealed against that decision.

THE LEARNED DR'S DECISION

[4] In granting the order in terms in favour of the JD to set aside the CP and BN, the learned deputy registrar ruled that the JD is a social guarantor as both the JD and the hirer are relatives and the JD agreed to become a guarantor upon request by the hirer on the understanding that the said Toyota Hilux was for personal use by the hirer.

[5] The learned deputy registrar also ruled that the JC had failed to satisfy the court that the JD was not a social guarantor as he was of the view that the MPOB licence attached by the hirer to support her application for the said hire

purchase facility and the fact that the said Toyota Hilux was totally damaged beyond repair after an accident cannot be the basis to say that the JD is not a social guarantor.

WHETHER THE JD IS A SOCIAL GUARANTOR

[6] Learned counsel for the JD submitted that in the circumstances of the present case, the JD falls under the definition of a 'social guarantor' because she was guaranteeing the hirer in respect of the hire purchase facility of the said Toyota Hilux for the hirer's personal use and not for the purpose of making profits.

[7] Learned counsel for the JC submitted otherwise that the JD is not a social guarantor as the hirer was doing the business of transporting the oil palm fruits for profits by virtue of the MPOB licence issued to the hirer (exh 'BBM1' of encl 18). It was further submitted that the hirer was self-employed and doing the business of buying and selling of oil palm fruits as stated in her application for hire purchase facility (exh 'BBM2' of encl 18).

[8] Having seen and read both exhs 'BBM1' and 'BBM2', I agree with the learned DR and the submission of learned counsel for the JD that in both documents, there is nothing stated that the said Toyota Hilux would be used by the hirer to generate incomes or profits for her business. By saying otherwise, learned counsel for the JC was only making assumptions without referring to some credible evidence just because the hirer was self-employed and without any fixed monthly income.

[9] Learned counsel for the JC also contended in his submission that since both the JD and the hirer are relatives, the JD must have known that the hirer was self-employed without any fixed monthly income and the subject matter of the hire purchase would be used by the hirer for her business of transporting oil palm fruits.

[10] In this regards, it is my view that the above contention on the JD's presumed knowledge is made without referring to some credible evidence. It is not a sworn statement in the form of affidavit to be filed and served on the opponent. In my view, it would only be fair for this contention by the JC be put to the JD by way of affidavit and the JD will have the opportunity to state whether she has any knowledge on the status of the hirer's employment or otherwise in the form of an affidavit as well. My point on the need for the JC to adduce evidence by way of affidavit leads to another issue in contention ie whether the JC needs to file the affidavit to satisfy the requirement of s 5(3) of the Act.

WHETHER THERE IS A NON-COMPLIANCE OF S 5(3) OF THE BANKRUPTCY ACT 1967

[11] The learned DR's ruled that the JC has failed to comply with s 5(3) of the Act in the sense that the JC did not prove to the satisfaction of this court that it has exhausted all avenues to recover debts owed to them by the JD.

[12] In the present case, it was the JC's contention that it had made all reasonable actions to recover the judgment debts from the hirer by proving that the repossession of the said Toyota Hilux was fruitless as it was totally damaged, a judgment had been entered against the hirer and the hirer had been adjudged a bankrupt. The JC further contended that there is no mandatory requirement for the JC to file a sworn affidavit at the hearing of the CP in order to satisfy the court that it had exhausted all avenues to recover the debts from the JD.

[13] I do not agree with the above contention as there is a clear authority from the apex court on this point ie the Federal Court case of *Hong Leong Bank Bhd v Khairulnizam bin Jamaludin* [2016] 4 MLJ 302; [2016] 7 CLJ 335. It was held as follows:

> [34] In our judgment, a reading of s 5(3) of the Act in the context of the purpose identified above would clearly advance the meaning that it would be sufficient compliance with s 5(3) of the Act if a creditor shows by way affidavit at the hearing of the creditor's petition that he has satisfied the requirement of s 5(3) of the Act.

[14] The above case was referred to by both the counsels in the appeal before me but learned counsel for the JC interpreted the above-quoted para 34 of the said decision rather in a different way. He submitted that the said paragraph did not actually state that a creditor must show by way of affidavit in order to satisfy the court that it had exhausted all avenues to recover the debts but it merely states that it would be sufficient for that purpose to do so by way of affidavit, thus leaving it open to the creditor to prove it by some other methods.

[15] What the JC did in the present case was that it wrote a letter dated 12 July 2017 addressed to the court stating that the principal debtor ie the hirer could not be located at the given address which was the reason why it failed to recover the debts. With this reason together with all other actions taken by the JC as stated above, it had already exhausted all avenues to recover its debts.

[16] It must be noted that the said letter by the JC dated 12 July 2017 only came into existence after the hearing on the CP on the 5 July 2017. Likewise the JC's affidavit (encl 18) enclosing exhs 'BBM1' and 'BBM2' to oppose the JD's notice of objection in encl 11 was filed on the 16 August 2017 after the hearing of the CP. It was confirmed that there was no affidavit filed by the JC at the hearing of the CP to satisfy the requirement of s 53 of the Act.

[17] Following the authority of *Hong Leong Bank Bhd*, the JC ought to show to the court by way of affidavits that all avenues had been exhausted by the JC to recover its debts. In my view, this is a minimum requirement imposed by s 5(3) of the Act from my reading of the wordings of para 34 of *Hong Leong Bank Berhad*'s case which stated that '*it would be sufficient compliance with* s 5(3) of the Act if a creditor shows by way affidavit at the hearing of the creditor's petition that he has satisfied the requirement of s 5(3) of the Act ...'. In other words, it seems to me that the filing of affidavit to satisfy the court pursuant to s 5(3) of the Act is mandatory in nature. Instead of showing proof by way of affidavit, learned counsel for JC produced the said letter dated 12 July 2017 to claim that it had pursued all avenues to recover its debts from the hirer.

[18] In my view, the letter dated 12 July 2017 produced by learned counsel for the JC is far from sufficient to satisfy the court pursuant to s 53 of the Act as the letter is not a sworn statement of the JC or its representative.

OTHER ISSUES RAISED IN THE APPEAL

[19] During the proceedings before the learned DR, the counsel for the JD informed the court that there were two notices of objection namely encl 11 and encl 13 which are similar in contents filed inadvertently by the JD to oppose the CP. Learned counsel for JD applied to the court to ignore the former notice of objection under encl 11 and to rely on the latter notice under encl 13. However, the learned DR proceeded with encl 11 instead of encl 13 to deal with the objection raised by the JD. Due to this mixed up on the identity of the two notices, learned counsel for the JC submitted that there was a clear misdirection by the learned DR.

[20] In my view, there is no prejudice caused to the JC as a result of the misdirection by the learned DR in considering encl 11 instead of encl 13. This is because, both encls 11 and 13 bear similar prayers and contents objecting to the CP filed by the JC. Furthermore, there was no objection by learned counsel for the JC on the withdrawal application of one of the enclosures which obviously redundant due to the clerical mistake made unintentionally by the JD.

[21] The last issue raised by learned counsel for the JC was on the mode used by the JD in opposing the CP which should be by way of an application made under r 18 of the Bankruptcy Rules 1969 and not by way of filing a notice of objection under encl 11. There was no objection raised by the JC on the mode used by the JD to commence her objection to the CP before the learned DR. As such, the JC could not bring up this issue in this appeal as it should be raised as

a point of law by way of preliminary objection before the learned DR prior to the hearing of encl 11.

CONCLUSION

[22] For the foregoing reasons, I dismissed the appeal with costs of RM3,000 in here and before the learned deputy registrar subject to the payment of allocatur fee.

Appeal dismissed with costs of RM3,000 here and below subject to allocator.

Reported by Dzulqarnain Ab Fatar